Supreme Court, U. S.
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78-1093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

THEODORE ROBERT BUNDY and
MILLARD C. FARMER, JR.,

Petitioners,

v.

JOHN RUDD, in his capacity as Judge for the Circuit Court of the Second Judicial Circuit in Leon County, Florida,

CHARLES M. McCLURE, in his capacity as Judge in County Court of Leon County, Florida, for the Second Judicial Circuit,

HARRY MORRISON, in his capacity as State Attorney in Leon County, Florida, and in his capacity of representing the State of Florida in criminal actions pending against Theodore Robert Bundy in the State of Florida, and

LARRY SIMPSON, in his capacity as Assistant State Attorney in Leon County, Florida, and in his capacity of representing the State of Florida in criminal actions pending against Theodore Robert Bundy in the State of Florida,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
JOHN CHARLES BOGER
Suite 2030
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

Attorneys for Petitioners

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IN THE
SUPREME COURT OF THE UNITED STATES
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THEODORE ROBERT BUNDY and
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Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

==========

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered October 2, 1978.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 581 F.2d 1126 (5th Cir. 1978) and is annexed as Exhibit A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 2, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require a state court to hold an evidentiary hearing, with prior notice of applicable legal standards and of specific instances of alleged misconduct, before it may deny an out-of-state attorney permission to represent a defendant pro hac vice in a capital case.

II. Whether the First and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment impose any limitations on a state court's discretion in deciding whether to permit an out-of-state attorney to represent a defendant pro hac vice in a capital case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involved the First, Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves Rule 2.060(b) of the Florida Rules of Judicial Administration:

> "Foreign Attorneys. Upon motion filed with a court showing that an attorney is a member in good standing of the bar of another state and that, under the rules of comity of the other state a member of The Florida Bar is permitted to appear in that state, attorneys of other states may be permitted to appear in particular cases in a Florida court. A request for an appearance shall be before oral arguments in an appellate court proceeding and before trial in a trial court. Attorneys of other states shall not do a general practice unless they are members of The Florida Bar in good standing."

STATEMENT OF THE CASE

A. State Court Proceedings

Petitioners incorporate fully by reference the Statement of the Case set forth in their petition for a Writ of Certiorari to the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida, in Bundy & Farmer v. Rudd, et al., No. 78- , filed in this Court on December 29, 1978.

B. Federal Court Proceedings

On August 4, 1978, Bundy and Farmer filed a complaint in the United States District Court for the Northern District of Florida, Tallahassee Division, pursuant to 42 U.S.C. §1983, seeking a declaration that the refusal by the Circuit Court of Leon County to permit petitioner Millard Farmer ("Farmer") to represent petitioner Theodore Bundy ("Bundy") against pending capital charges violated the constitutional rights of both petitioners (A. 95-102).*/ The complaint was accompanied by a

*/ All references are to the Appendix filed in the court below. Each reference will be indicated by the abbreviation "A." followed by the number of the page on which the reference may be found.

motion for preliminary and permanent injunctive relief. At a hearing on petitioners' motion held August 11, 1978, the State of Florida successfully contended that the district court should deny temporary relief and stay its hand because of petitions filed by Bundy and Farmer in the Supreme Court of Florida.

After the Supreme Court of Florida denied the state petitions on August 21, 1978, Bundy and Farmer filed a second amended complaint (A. 229-33), again seeking injunctive relief (A. 244-45). Following a hearing, the federal district court entered an order on September 15, 1978 denying petitioners' motion and dismissing the complaint (A. 311).

In its memorandum order, the district court held that the principles in Younger v. Harris, 401 U.S. 37 (1971) mandated that it abstain from deciding Bundy's claim until he had completed his state criminal proceedings. Bundy v. Rudd, 581 F.2d 1126, 1129-30 (5th Cir. 1978).*/ However,

*/ The September 15, 1978 opinion of the district court was appended to the Fifth Circuit's decision, and citations to the district court's decision refer to the published appendix in the Fifth Circuit's decision.

the court acknowledged that "Younger principles would not dispose of Farmer's contentions," 581 F.2d at 1130, since Farmer was seeking only a procedurally adequate hearing in the state court on his pro hac vice motion, and "[m]erely ordering the state court to hold a further hearing on Farmer's own claims would not prejudice, or interfere with, the conduct of Bundy's trial . . ." Id. Reaching the merits of Farmer's claims the district court held that the state court's action did not deny to Farmer either a liberty or a property interest sufficient to invoke the requirements of due process. 581 F.2d at 1131. The court also determined that the Florida Circuit Court's adoption of §3.5 of the American Bar Association's Standards Relating to the Function of the Trial Judge as a basis for excluding Farmer was "sufficient to satisfy the . . . requirement that the denial of admission to appear pro hac vice be based upon 'a reasonably clear standard and a statement of reasons.'" 581 F.2d at 1132. Finally, the court held that the hearing afforded by the Florida circuit court was adequate and "the only purpose . . . a further hearing would serve

would be to permit Mr. Farmer to relitigate in the Florida Courts the underlying issues resulting in the judgments of contempt against him in Georgia." Id.

Bundy and Farmer filed an expedited appeal from the district court's judgment to the Fifth Circuit, which, in a per curiam order entered on October 2, 1978, affirmed on the basis of the decision of the district court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioners' first argument in its brief to the court below was that "Farmer's contempt [Farmer v. Holton (146 Ga. App. 102)] cannot be used as an easy and absolute bar to all admissions pro hac vice." Brief for Plaintiffs-Appellants ("Brief") at 10. Petitioners contended that Farmer's contempt conviction should not have been "given the unrebuttable weight attached to it by the U.S. District Court", Brief at 19, and that the Florida Circuit Court had abridged Farmer's First Amendment rights by denying him permission to appear pro hac vice, in part, because of the Court's "disagreement with Farmer on issues of race and other social issues", Brief at 28. In

their second point, petitioners alleged that "Farmer was denied due process in the 'proceedings' to determine his representation of Bundy" Brief at 20, that the Florida Circuit Court proceeding could not "be designated as a due process hearing [since] one of the parties was denied the right to present evidence [and] notice of charges", Brief at 21.

In adopting the decision of the district court, the court below rejected both of petitioners' claims.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE A STATE COURT TO HOLD AN EVIDENTIARY HEARING, WITH PRIOR NOTICE OF APPLICABLE LEGAL STANDARDS AND OF SPECIFIC INSTANCES OF ALLEGED MISCONDUCT, BEFORE IT MAY DENY AN OUT-OF-STATE ATTORNEY PERMISSION TO REPRESENT A DEFENDANT PRO HAC VICE IN A CAPITAL CASE.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FIRST AND SIXTH AMENDMENTS AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IMPOSE ANY LIMITATIONS ON A STATE COURT'S DISCRETION IN DECIDING WHETHER TO PERMIT AN OUT-OF-STATE ATTORNEY TO REPRESENT A DEFENDANT PRO HAC VICE IN A CAPITAL CASE.

Petitioners incorporate fully by reference the Reasons for Granting the Writ set forth in their petition for a writ of certiorari to the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida in Bundy & Farmer v. Rudd, et al., No. 78- , filed in this Court on December 29, 1978.

CONCLUSION

Petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
JOHN CHARLES BOGER
Suite 2030
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR PETITIONERS

APPENDIX

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3026

Theodore Robert BUNDY, and Millard C. Farmer, Jr.,

Plaintiffs-Appellants,

v.

John RUDD, et al.,

Defendants-Appellees.

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

The denial of requested relief and dismissal entered by the Trial Court is affirmed on the basis of the unpublished Order entered by Judge William Stafford on September 15, 1978, appended hereto.

October 2, 1978

APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 78 0897

THEODORE ROBERT BUNDY,
Leon County Jail
2825 Municipal Way
Tallahassee, Florida 32304

and

MILLARD C. FARMER, JR.,
Suite 831
15 Peachtree Street, N.E.
Atlanta, Georgia 30303

Plaintiffs,

vs.

JOHN RUDD,
In his capacity as Judge
for the Circuit Court of the
Second Judicial Circuit,
in Leon County, Florida,

CHARLES M. McCLURE,
In his capacity as Judge in County
Court of Leon County, Florida,
for the Second Judicial Circuit,

HARRY MORRISON,
In his capacity as State Attorney
in Leon County, Florida, and in his
capacity of representing the State
of Florida in Criminal Actions
Pending Against Theodore Robert
Bundy in the State of Florida,

LARRY SIMPSON,
In his capacity as Assistant State
Attorney in Leon County, Florida and
in his capacity of Representing the
State of Florida in Criminal Actions
Pending Against Theodore Robert
Bundy in the State of Florida,

Defendants.

ORDER

Before the court are plaintiffs' motion for preliminary injunction and demand for permanent injunctive and declaratory relief and defendants' motion to dismiss or, in the alternative, to strike.

I.

The procedural history of this action as relevant here unfolds as follows. On July 24, 1978, the Public Defender for the Second Judicial Circuit of Florida moved in Leon County Circuit

Court on behalf of Theodore Robert Bundy, co-plaintiff in this case, for leave to have co-plaintiff Millard C. Farmer, Jr. appear with the Public Defender to represent Bundy in the state grand jury proceedings scheduled to commence in Tallahassee on July 25. Attached to the motion was a certificate of Farmer's good standing as an attorney from the Georgia Supreme Court. The Circuit Court reserving ruling on that motion. The Leon County Grand Jury then indicted Bundy for various offenses including first degree murder and burglary. At Bundy's first appearance on these charges on July 28, he moved the County Court to allow Farmer to represent him solely during that proceeding. That motion was denied by the County Judge, defendant Charles M. McClure. Bundy was arraigned in Circuit Court July 31; at that time Farmer requested the right to represent Bundy pro hac vice solely for the arraignment but that request was denied by the Circuit Judge, defendant John A. Rudd. At an August 2 hearing on the State's motion to extend time for speedy trial, Farmer once again renewed his motion to represent Bundy pro hac vice. Judge Rudd granted Bundy ten additional days to oppose the motion of

the state (represented by defendants Harry Morrison and Larry Simpson) for extension of time and orally denied Bundy's August 2 motion requesting Judge Rudd to disqualify himself. A written order to that effect was entered the next day by Judge Rudd along with an order denying Farmer the right to represent Bundy pro hac vice. Bundy filed a pro se petition for writ of common law certiorari with the Supreme Court of Florida on August 4, 1978, requesting an order from that court directing the state to show cause why he was being denied his Sixth Amendment right to counsel. Also on August 4 Bundy and Farmer filed this 42 U.S.C. § 1983 action, requesting preliminary and permanent injunctions along with declaratory relief, the gravamen of the complaint alleging a denial of plaintiffs' rights to due process, to equal protection and to counsel. Chief Judge Arnow of this court denied plaintiffs' respective motions for a preliminary injunction following a hearing on August 11. On August 14 plaintiffs filed their joint petition with the Florida Supreme Court seeking writs of certiorari, mandamus and prohibition, with both Farmer and Bundy alleging viola-

tions of their First, Fifth, Sixth and Fourteenth Amendment rights. On August 21, 1978, the Supreme Court of Florida denied all of plaintiffs' writs without opinion. On August 23 defendants filed a motion to dismiss in this case, and on August 28 both plaintiffs renewed their requests here for preliminary injunction. This court held a hearing on all pending motions on September 6, at which time counsel announced that all evidence, legal authority and pleadings were before the court and that this matter was ripe for disposition.

II.

Defendants claim that plaintiffs amended their complaint the second time without receiving,or even seeking, leave of court as required by Rule 15(a) Fed.R.Civ.P. Inquiry at the September 6 hearing demonstrated no prejudice to defendants from allowing the amendment, and, accordingly, plaintiffs were then granted leave to file their second amended complaint.

Plaintiffs advance two separate theories in this case. In spartan terms, plaintiff Bundy requests relief from an alleged denial of his

Sixth Amendment right to counsel, while plaintiff Farmer contends that he was denied the essentials of due process required prior to deprivation of liberty or property interest under the Fourteenth Amendment.

Defendants, in turn, seek dismissal of all claims here, contending alternatively that this court should abstain in deference to the state court, that Farmer has been accorded whatever due process he is entitled to receive, and that plaintiffs' proper remedy, in any event, is to seek review in the United States Supreme Court under 28 U.S.C. § 1257.

The claims of each plaintiff will be considered separately.

III.

[1] Plaintiff Bundy, indicted for numerous state felonies, including capital offenses, asks this federal court to order the state trial court to allow plaintiff Farmer, not a member of The Florida Bar, to represent Bundy in his pending criminal cases. The Public Defender's office was appointed by the Florida state courts to represent

Bundy; however, with the appearance of plaintiff Farmer on the scene, Bundy has now refused the services of the Public Defender. The Public Defender remains available to represent Bundy,[1/] but Bundy wants Farmer to be his lawyer. Farmer is equally anxious to represent Bundy. To refuse these mutual requests, says Bundy, is to deny him his Sixth Amendment right to counsel.

To grant Bundy's request would result in this court's ordering the state trial judge before whom the criminal case is pending to permit a pro hac vice appearance by an attorney already refused such admission by that same state judge, a direct interference with the ongoing state criminal prosecution.

If there was ever a doubt as to the propriety or wisdom of federal district court intrusion into pending state criminal proceedings, that doubt was removed by the decision of the United States Supreme Court in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Citing first

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1/ Fla. Stat. §§27.53 and 925.035 authorize state trial courts by special assignment to appoint members of the bar in good standing to represent indigent defendants with fees, costs and expenses fixed by the court and paid by the state.

the traditional equitable principle that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" Id. at 43-44, 91 S.Ct. at 750, the Court then articulated

> an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44, 91 S.Ct. at 750.

The late Justice Hugo Black, writing for the majority in Younger, analyzed the historic and contemporary application of this concept:

> The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and

> National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," borne in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Id. at 44-45, 91 S.Ct. at 750.

The fact that the defendants also seek a declaratory judgment, ostensibly a less onerous intrusion on the state criminal proceedings, is of no moment. Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), decided the same day as Younger holds that whether the relief sought is declaratory judgment or injunction, the federal interference with pending state criminal prosecution is the same.

In its August 23, 1978 decision in Gibson v. Jackson, 578 F.2d 1045, the Fifth Circuit

Court of Appeals, while cautioning that the abstention doctrine of Younger and its progeny is to be applied on a case-by-case basis and "determined by principled discretion not doctrinaire adherence," nevertheless vacated the judgment of the federal district court which had ordered the State of Georgia to furnish court-appointed counsel and other monetary assistance in state habeas corpus proceedings to a state defendant sentenced to death. Perhaps apropos in the context of this case is the special concurring opinion of two of the three judges in Gibson, that opinion expressing the view that cases where the death penalty is involved should not be governed by a special category of safeguards different from those cases where a lesser penalty is imposed.

Application of the principles of Younger and Gibson to the case at bar mandates that this court stay its hand as to Bundy's claims.

IV.

[2] Plaintiff Famer seeks a hearing in the state court, alleging that the proceedings there to date did not afford him due process and resulted in a denial of his property and liberty

interests. Defendants deny that Farmer has such interests, maintaining that whatever due process rights he had were protected by the state court. Defendants would also have this court apply Youger-type abstention to his claims.

Merely ordering the state court to hold a further hearing on Farmer's own claims would not prejudice, or interfere with, the conduct of Bundy's trial on the merits. Gerstein v. Pugh, 420 U.S. 103, 108, n.9, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The "equitable restrictions" of Younger are not aimed at collateral issues in state criminal proceedings; therefore, Younger principles will not dispose of Farmer's contentions. Accordingly, the court turns to his due process claim.

[3] Plaintiff Farmer has asserted an interest he characterizes as a deprivation of a "substantial right or status." If by that allegation he attempts to establish a property interest sufficient to invoke due process, then he fails in that regard.

> Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits.

Goss v. Lopez, 419 U.S. 565, 572, 95 S.Ct. 729, 735, 42 L.Ed.2d 725 (1975). See, e.g., Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), vacated 436 U.S. ____, 98 S.Ct. 3118, 57 L.Ed.2d 1144, on remand, 578 F.2d 1167 (1978).[2/] Farmer has referred this court to no such independent source. Without "more than an abstract need or desire . . . [o]r a legitimate claim of entitlement" to represent Bundy, Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1977), Farmer's claim cannot rise to the level of a property right.

[4] Alternatively, in his attempt to assert a denial of liberty sufficient to invoke due process, Farmer alleges an injury to his "professional reputation and character," a "badge of infamy" and "contamination" to his reputation. Dennis v. S & S Consolidated Rural H.S. Dist., 577 F.2d 338 (5th Cir. 1978), elaborated upon the

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2/ Thurston had been vacated only in regard to the award of back pay and still stands as good law on the question of due process.

liberty interest test discussed in Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Fifth Circuit calling it "stigma-plus."

> To establish a liberty interest sufficient to implicate Fourteenth Amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law.

Dennis at 341. Assuming, arguendo, that Farmer has been stigmatized by not being allowed to represent Bundy in the state criminal proceedings, it is difficult to determine what previously recognized right or status under state law he had been denied. Indeed, Farmer has not pointed to any such right or status. Certainly, his claimed pro hac vice appearance in other Florida courts does not create a sufficient "plus" to make his reputation a constitutionally protected liberty interest. See Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) (employment termination cases). This claim of Farmer's likewise must fail.

Farmer maintains, however, that he is entitled to relief here because of the Sixth Circuit holding in Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978), appeal docketed, 46 U.S.L.W. 3723 (May 23, 1978). In Flynt the out-of-state attorneys had already been admitted pro hac vice by one state court judge to represent the defendants, when suddenly the judge to whom the case was assigned for trial summarily, without notice, without hearing and with no reason given, revoked their admission and would not allow them to participate further as counsel in the case. The out-of-state attorneys in Flynt had previously appeared as trial counsel in the same judge's court without incident and were found by the Sixth Circuit "to have exemplary academic and professional qualifications." Flynt at 876. Without deciding what the nature of these attorneys' interest was when they originally sought admission, the Sixth Circuit found that once the state court had authorized them to act, their interest had advanced to the state where they could not be denied the right to further appear for their clients "without a meaningful hearing, the application of a reasonably clear legal standard and the statement of a rational basis for exclusion." Flynt at 879. Finding that none of these due process

requirements were present and rejecting the Younger abstention argument, the Sixth Circuit affirmed the district court which had enjoined the state prosecution until the attorneys were granted a due process hearing. This is the same relief Farmer seeks from this district court.

[5] What occurred in Flynt is far different from the case at bar. Farmer has never been admitted to practice in the state courts of Leon County, and particularly has not been permitted to appear pro hac vice in his representation of Mr. Bundy by any judge in Leon County. He had, thus, not acquired the status as counsel of record as the out-of-state attorneys in Flynt had done. Further, the state court had before it a reported decision reflecting adversely upon Mr. Farmer's conduct as trial counsel in the State of Georgia where he is admitted to practice. In Farmer v. Holton, 146 Ga.App. 102, 245 S.E.2d 457 (1978), the Georgia Court of Appeals reviewed the judgment of the trial court which found Mr. Farmer guilty of direct criminal contempt twice in connection with the same proceeding. In affirming Mr. Farmer's convictions of contempt the Georgia Court of Appeals found that Mr. Farmer's "continuous

disregard of the court's instruction, his question to the court, . . ., his verbal assault on the court charging it with malicious and arbitrary reasoning on rulings made during voir dire," and his other assertions were "insulting, contemptuous and contumacious." The Georgia Court of Appeals, therefore, found that such conduct represented "criminal contempt clearly and beyond a reasonable doubt." On September 14, 1978 the Georgia Supreme Court denied Mr. Farmer's petition for writ of certiorari. The state court judge applied to this finding of contemptuous conduct the American Bar Association Standards Relating to the Function of the Trial Judge, § 3.5 (1972), which reads in part:

> 3.5 Attorneys from other jurisdictions.
>
> If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may
>
> (a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action; . . .

This is sufficient to satisfy the Flynt requirement that the denial of admission to appear pro hac vice be based upon "a reasonably clear standard and a statement of reasons." Flynt at 877. Other sections of the same ABA standards were quoted with approval by the Fifth Circuit in United States v. Dinitz, 538 F.2d 1214 (5th Cir. 1976).

Flynt also discusses the need for a hearing, and in this context consideration of the Fifth Circuit decisions in In re Evans, 524 F.2d 1004 (5th Cir. 1975) and Dinitz, supra, is appropriate. Read together, Dinitz and Evans suggest that "fundamental fairness may require . . . a hearing in most . . . situations" where admission pro hac vice is denied.[3/] Farmer has already been heard by the Florida state court judge, but claims that that hearing was not adequate. Farmer's situation presents an instance where the Dinitz rationale would not require a further hearing in the Florida state court because the

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3/ Since Evans and Dinitz dealt with admission pro hac vice in federal district court, it is not clear to what extent their collective rationale applies to the state courts.

only purpose such a further hearing would serve would be to permit Mr. Farmer to relitigate in the Florida courts the underlying issues resulting in the judgments of contempt against him in Georgia. He clearly is estopped from doing this. Thus, requiring the state court to hold a further hearing on these issues would be both unnecessary and unproductive.

The court, having considered all of the claims pursued by Farmer, finds that he, like Bundy, cannot prevail in this case.[4/]

IV.

Accordingly, it is ORDERED:

1. Plaintiffs' motion for preliminary injunction and their demands for permanent injunctive and declaratory relief are hereby DENIED.

2. Defendants' motion to dismiss is GRANTED.

3. This cause is dismissed with prejudice with each party to bear his own costs.

4. The clerk of this court will enter judgment accordingly.

4/ In their pleadings, plaintiffs alluded to an equal protection claim. Yet no deprivation of any protected right was briefed or argued to this court. Therefore, it is not considered.

Supreme Court, U. S.
FILED
FEB 5 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1093

THEODORE ROBERT BUNDY and
MILLARD C. FARMER, Jr.,

Petitioners,

vs.

JOHN RUDD, In His Capacity as Judge for the Circuit Court of the Second Judicial Circuit in Leon County, Florida, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIM SMITH
Attorney General

RICHARD A. HIXSON
Assistant Attorney General
Department of Legal Affairs
Civil Division
Tallahassee, Florida 32304
904/488-1573

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1093

THEODORE ROBERT BUNDY and
MILLARD C. FARMER, JR.,

Petitioners,

vs.

JOHN RUDD, In His Capacity as Judge for the Circuit Court of the Second Judicial Circuit in Leon County, Florida, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 581 F.2d 1126 (5th Cir. 1978).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether the asserted right of an out-of-state attorney to appear pro hac vice in a Florida court is an interest protected by the Due Process Clause of the Fourteenth Amendment.

II. If such an interest is protected by the Fourteenth Amendment, whether Petitioner was afforded due process under the circumstances of this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The case involves the Fourteenth Amendment to the United States Constitution.

2. This case involves Rule 2.060(b) of the Florida Rules of Judicial Administration:

> "Foreign Attorneys. Upon motion filed with a court showing that an attorney is a member in good standing of the bar of another state and that, under the rules of comity of the other state a member of The Florida Bar is permitted to appear in that state, attorneys of other states may be

> permitted to appear in particular cases in a Florida court. A request for an appearance shall be before oral arguments in an appellate court proceeding and before trial in a trial court. Attorneys of other states shall not do a general practice unless they are members of The Florida Bar in good standing."

3. This case also involves Art. I, §1 of the Florida Rules of the Supreme Court relating to Admissions to the Bar:

> The admission of attorneys to the practice of the profession of law is a judicial function. All individuals who seek the privilege of practicing law in the State of Florida shall submit to Part I and Part III of the Florida Bar Examination and shall provide such score from submission to Part II, as specified in Article II, Section 10(c) of these Rules. The Court promulgates the rules hereinafter set forth and adopts and approves the Code of Recommended Standards of Bar Examiners, adopted by the American Bar Association on May 21, 1958, promulgated and approved by the National Conference of Bar Examiners and the Association of American Law Schools, except where

such standards are inconsistent with the rules of this Court or the rules of the Board hereinafter established.

STATEMENT OF THE CASE

This litigation concerns the asserted right of Petitioner, Millard Farmer, an attorney licensed to practice in the State of Georgia, to represent Petitioner, Theodore Bundy, a criminal defendant accused of capital offenses in Florida, in the criminal proceedings against Petitioner Bundy in the Florida trial court. The facts of this case are adequately set forth in the opinion of the district court as adopted by the Fifth Circuit Court of Appeals, Bundy v. Rudd, supra, 581 F.2d at 1128-1129.

Subsequent to the decision of the Fifth Circuit Court of Appeals, the Florida Supreme Court on December 22, 1978, directed the assignment of another State trial judge to replace Respondent Rudd, the presiding Florida trial judge at the time this case arose. A copy of the order of the Florida Supreme Court is appended hereto. (A. 1-4.)

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE PRINCIPLES OF YOUNGER v. HARRIS, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN DECLINING TO REQUIRE THE PRO HAC VICE ADMISSION OF AN OUT-OF-STATE ATTORNEY IN STATE CRIMINAL PROCEEDINGS.

Petitioner in this action sought an injunction from a federal district court enjoining on-going State criminal proceedings until such time as Petitioner Farmer, an out-of-state attorney, was granted pro hac vice admission to represent Petitioner Bundy, a defendant under capital indictment in Florida. As to the claims of Petitioner Bundy, the courts below recognized that such claims could be asserted in the State proceeding, and accordingly denied intervention under the principles of Younger v. Harris, supra. This issue is not asserted by the Petitioners herein.

As to the claims of Petitioner Farmer, Petitioners assert that the notice, hearing, and reasons stated by the Florida trial court for denial of pro hac vice admission did not comport with the due process requirements of the Fourteenth Amendment.

The courts below held that Petitioner Farmer's interest in pro hac vice admission was not a protected interest under the Due Process Clause of the Fourteenth Amendment, and even assuming such interest was protected, the circumstances of this case comported with fundamental due process requirements.

This court has recently held that the asserted right of an out-of-state attorney to appear pro hac vice does not fall within those interests protected by the Due Process Clause of the Fourteenth Amendment in the summary reversal of Leis v. Flynt, ___ U.S. ___, case No. 77-1618 (decided January 15, 1979). As the court observed in Flynt, supra, the Due Process Clause of the Fouteenth Amendment ". . . extends various procedural safeguards to certain interests 'that stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577(1972).'" Leis v. Flynt, supra, ___ U.S. at ___, slip op. at 4.

In the case at hand, the courts below recognized that under Florida law, as in Ohio, an out-of-state attorney has no claim of entitlement derived from state statute or legal rule to appear pro hac vice in Florida courts. The Florida Supreme Court has specifically prohibited reciprocation, Art. I, §1, Fla. Rules of

the Supreme Court Relating to Admissions to the Bar, and Rule 2.060(b) of the Florida Rules of Judicial Administration expressly commits such admission to the discretion of the State trial court. Under these circumstances, as recognized by the courts below, there exists no independent source for such asserted rights of Petitioners, and the interest sought to be protected does not fall within the ambit of the Due Process Clause of the Fourteenth Amendment.

Moreover, Petitioners, in the courts below relied heavily upon the now reversed decision of the Sixth Circuit in Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978), and the courts below held that even if the decision in Flynt were correct in its application of the Fourteenth Amendment, that the Petitioners in this case were given adequate notice, opportunity to be heard, and a statement of reasons for denial of pro hac vice admission to comply with due process. Bundy v. Rudd, supra, 581 F.2d at 1132. Accordingly, even if Flynt had not been reversed, the petitioners in this case have been afforded adequate procedural protection.

II.

THIS CASE DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

Rule 19 of the Supreme Court Rules provides in part that a writ of certiorari ". . . will be granted only where there are special and important reasons therefor." Rule 19(b), S.Ct.R. then sets forth an indication of the character of the reasons considered in the disposition of petition for writ of certiorari:

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Here, this Court has recently in Leis v. Flynt, supra, by summary disposition decided the issues raised by Petitioners, and the opinion of the

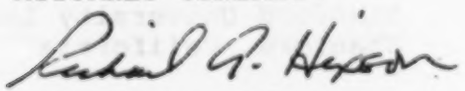
Fifth Circuit Court of Appeals is in accordance with the Flynt decision. Accordingly, the issues sought to be asserted herein do not meet the requirements of Rule 19, supra, and the petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents submit that the questions upon which this cause depend are insufficient to support the issuance of a writ of certiorari. Respondents accordingly move this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



RICHARD A. HIXSON
Assistant Attorney General

Department of Legal Affairs
Civil Division
The Capitol
Tallahassee, Florida 32304
904/488-1891

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit was forwarded by U. S. Mail to the following on the _____ day of February, 1979:

Jack Greenberg
James M. Nabbit, III
Joel Berger
John Charles Boger
Suite 2030
10 Columbus Circle
New York, New York 10019

Anthony G. Amsterdam
Stanford University Law School
Stanford, California 94305

RICHARD A. HIXSON

APPENDIX

Supreme Court of Florida

No. 53,411

RECEIVED
DEC 26 1978
ATTORNEY GENERALS OFFICE
Docketed
12-26-78
Florida Attorney General

THEODORE R. BUNDY, Petitioner,

vs.

JOKI A. RUDD, as Circuit Judge of the Second Judicial Circuit in And for Leon County, Florida, Respondent.

[December 22, 1978]

PER CURIAM.

This case is before the Court on a petition for a writ of prohibition to prevent the respondent from continuing to exercise jurisdiction as trial judge in certain criminal proceedings presently pending against the petitioner in the Leon County Circuit Court. Because the case is one in which a sentence of death might ultimately be imposed, we have jurisdiction. Art. V, § 3(b)(1), Fla. Const., see Teina v. State, 352 So.2d 853 (Fla. 1977).

By indictment filed on July 27, 1978, petitioner was charged with two counts of murder in the first degree, three counts of attempted murder in the first degree, and two counts of burglary of a dwelling. After entering a plea of not guilty petitioner filed a written motion to disqualify the trial judge, setting forth various incidents which had transpired during the course of the proceedings, and alleging that respondent had exhibited such prejudice as to place petitioner in fear that he would not receive a fair trial. The motion was accompanied by the supporting affidavits of petitioner, of the public

defender appointed to represent him, and of four members of the public defender's staff who had participated in the preparation of petitioner's defense.

On November 20, respondent entered an order denying the motion for disqualification on the ground that the motion was legally insufficient. The order went on to explain, and in some respects controvert, the specific factual allegations contained in the motion. On the same day, petitioner filed a motion for reconsideration, to which he attached another affidavit of the public defender essentially denying that respondent's explanatory account of certain events was truthful. When that motion was similarly denied, again with explanation, petitioner instituted the present action in an effort to prevent his impending trial from commencing as scheduled on December 4.

Upon initial consideration, we determined that the petition on its face demonstrated a preliminary basis for relief and entered an order directing respondent to show cause why the motion and supporting affidavits were not legally sufficient. Having now considered all the relevant documents filed in this proceeding, we conclude that petitioner is entitled to the relief requested.

Regardless of whether respondent ruled correctly in denying the motion for disqualification as legally insufficient, our rules clearly provide, and we have repeatedly held, that a judge who is presented with a motion for his disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Fla. R. Crim. P. 3.230(d); see, e.g., Dickenson v. Parks, 104 Fla. 577, 140 So. 469 (1932); Suarez v. State, 95 Fla. 42, 115 So. 519 (1928); Theo. Hirsch Co. v. McDonald Furniture Co., 94 Fla. 135, 113 So. 317 (1927). When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established

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grounds for his disqualification. Our disqualification rule, which limits the trial judge to a bare determination of legal sufficiency, was expressly designed to prevent what occurred in this case--the creation of "an intolerable adversary atmosphere" between the trial judge and the litigant. See Department of Revenue v. Golder, 332 So.2d 1, 7 (Fla. 1975) (On Reconsideration).

Once a basis for disqualification has been established, prohibition is both an appropriate and necessary remedy. Brown v. Rowe, 96 Fla. 289, 118 So. 9 (1928). Accordingly, the writ of prohibition must issue directing respondent to disqualify himself in all proceedings presently pending against the petitioner. We assume, however, that the formal issuance of the writ will be unnecessary.

The chief judge of the Second Judicial Circuit shall assign another judge within the circuit to preside over proceedings pending against petitioner, unless he shall deem it appropriate to request the chief justice of the Supreme Court to assign a qualified judge from without the circuit, pursuant to the provisions of Article V, Section 2(b) of the Florida Constitution.

It is so ordered.

ENGLAND, C.J., BOYD, OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., Concur

Case of Original Jurisdiction - Prohibition

Michael J. Minerva, Public Defender, Tallahassee, Florida,

for Petitioner

Robert L. Shevin, Attorney General; and Miguel A. Olivella, Jr., Assistant Attorney General, Tallahassee, Florida,

for Respondent

see

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